No. 91-878

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN JOYNER, et al.,
Petitioners,

vs.

RUBY HEWITT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals correctly held that governmental ownership, operation and maintenance of a public park dominated by 36 permanent, larger-than-life size statues of Jesus Christ and other biblical figures arranged in thirteen scenes from the New Testament depicting the life of Christ violates the religion clauses of the California Constitution, the meaning of which are well-setttled under state law, and where petitioner raised no abstention argument at trial or on appeal.

Whether the Court of Appeals erred in reviewing *de novo* the district court's decision of a mixed question of fact and law, or the district court's decision of a question of state law.

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In the Supreme Court
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JOHN JOYNER, et al.,
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Petition For Writ of Certiorari
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Ruby Hewitt, Ralph Winant, Jerry Weitman, Darrell Barker and Dennis Molloy submit this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

The public parkland at issue prominently displays thirty-six statues organized into thirteen (13) scenes from the New Testament depicting prominent stories of the life of Christ, and other Christian symbols.[1] No other artistic displays -- secular *or* religious -- are located on this public land. The only other park facilities are two picnic areas and restrooms. ER:55.[2] For most of the park's history -- in fact, until well *after* the initial communication of the complaints which gave rise to this litigation -- the official name of this park was "Desert Christ Park." The park has never been recognized under any state or federal programs protecting historic landmarks.

After a one-day bench trial, the district court concluded that the government's maintenance and operation of Desert Christ Park did not violate the Establishment Clause of the

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[1] The religious nature of these displays is readily apparent from the photographs admitted at trial and appended to the Ninth Circuit's opinion. Petitioners' Appendix (hereinafter "Pet.App.") at pp. 28-37. Respondents have adopted Petitioners' references to the decisions below. The decision of the district court is designated herein as "Decision." The opinion of the appeals court is designated as "Opinion."

[2] The citations to the record below are designated herein as Plaintiffs' Exhibit ("PX") and Excerpts of Record on Appeal to the Ninth Circuit ("ER").

United States Constitution or the religion clauses of the California Constitution. The court recognized that "the park statuary, in content and appearance, reflect traditional Christian themes." Decision, Pet.App. at B-13. Nonetheless, the court concluded that the "aesthetically pleasing nature" of the sculptures minimized their constitutional infirmity. *Ibid.*

Originally dedicated by private parties on Easter Sunday, the District rededicated the park as Desert Christ Park in 1964, and maintained it as Desert Christ Park until May, 1987. After plaintiffs raised Establishment Clause objections, defendants officially changed the name of the park to "Antone Martin Memorial Park" (ER:3, 52), while simultaneously including the phrase "Formerly Desert Christ Park." ER:5. Even after the name change, petitioners continued to advertise the park as Desert Christ Park. ER:56; ER:14.

The park adjoins the Evangelical Free Church. ER:32, 39. Even now, there is no significant separation of the parcels by barriers, walls or fencing and at least 120 feet of the border between the two properties, the area on which many of the statues are displayed, remains completely unseparated. ER:24, 25, 32-34, 39-41, 59. Moreover, one of the scenes depicted in the park -- the bas relief Last Supper -- straddles the border between the park and the church. ER:25, 59.

The brochure produced and distributed by the County at the park until one year after this litigation began described scenes by their corresponding New Testament references: "Christ receiv[ing] a group of parents and children in the 'Children are Blessed' tableau [*Mark:10*]," the "Sermon on the Mount [*Matthew:5*]," "Christ and the Woman of Samaria [*John:4*]," "Christ in the Home of Lazarus [*John:4*]," "Christ kneel[ing] in prayer while [the Disciples] Peter, James and John sleep [*Matthew:26*]," "The Last Supper [*Matthew:26*]," "[a] large figure of the seated Christ in the 'Suffer Little Children to Come Unto Me' group [*Mark:10*]," "Judas Reflects," and "Christ's Blessing."[3]

In November, 1987, plaintiffs filed suit in U.S. District Court for the Central District of California, alleging that the ownership, maintenance and promotion of a permanent Christian theme park by the government violated the First Amendment to the federal Constitution and two religion

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[3] PX1 at 2; ER:2. The revised brochure now identifies the same permanent statues as "Woman of Samaria," "In the Home of Lazarus," "Garden of Gethsemane," "Suffer the Little Children" and "The Last Supper," removing all but two of the explicit references to Christ. ER:16. It also continues to describe and promote scenes and symbols on adjoining church property, including the Resurrection, Christ the Blessing and the lighted cross, without any indication that these scenes are not all one property owned and promoted by the government. ER:15-16, 62.

clauses of the California Constitution. At no time in the district court proceedings did defendants move to dismiss the state claims or to have the district court abstain from deciding the state claims.

The district court conducted a one-day bench trial during which it heard testimony from six witnesses, including two experts in the study of religion. Except for one witness, the District Park Director, all of the witnesses testified that they felt the park conveyed a message of endorsement of Christianity. ER:37, 42-47, 70-71, 87.

The court unsuccessfully pressed one expert, Professor Crossley, to say that the scenes were primarily reflective of peace and not religion. ER:82. Professor Crossley testified that if the scenes are viewed as images of peace, it is only because of a view equating Christian Gospel stories of Christ as a man of peace. ER:83. He also testified that "the New Testament is exclusively the book of the Christian faith and all the scenes depicted in the statuary are New Testament Scenes," ER:70-71, with no significance in most, if not all, other religions, ER:75-76.

Although recognizing that the statues have "*prominent* significance to Christianity," and reflect "traditional Christian themes" (Decision, Pet.App. at B-14 (emphasis supplied)), the district court nevertheless concluded, without any evidence or

testimony to support this finding, that because Antone Martin "was not a man of great religious bent[,]" the New Testament statues depicted peaceful scenes rather than religious ones. *Id.* at B-12. The court based its holding on an erroneous and unsupported conclusion that the New Testament was not well known and, thus, scenes depicting the life of Christ "have not attained the same level of religious notoriety with the general public as a cross or a creche." *Id.* at B-14.

Based on this unsupported assertion, the trial court concluded that the government's ownership and promotion of Desert Christ Park satisfied each prong of the test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Decision, Pet.App. at B-7-17. In its analysis of administrative entanglement, the court focused primarily on two factors: (1) the operating budget of the park, which the court termed "*de minimis*"; and (2) the lack of any clear boundary between the park and the church. Decision, Pet.App. at B-17-19.

Finally, the court addressed Article I, section 4 and Article XVI, section 5 of the California Constitution, concluding that the park is constitutional. In considering the state constitutional claims, the district court simply quickly referenced its *Lemon* analysis of the federal constitutional issues. *Id.* at B-20-23.

On appeal, both petitioners and respondents fully briefed the federal and state law questions. The Ninth Circuit panel unanimously held that the district court had misinterpreted state law decisions and reversed the lower court's decision on state constitutional law grounds. For the first time in their Petition for Rehearing, petitioners raised a claim of abstention. The petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEAL CORRECTLY DECIDED AN ISSUE OF STATE LAW WHERE NO BASIS EXISTED TO SUPPORT *PULLMAN* ABSTENTION BY THE FEDERAL COURT AND WHERE ABSTENTION WAS NOT RAISED AT TRIAL OR ON APPEAL

A. The Court of Appeal Properly Reviewed the Decision of the District Court on State Law Grounds Where No Basis Existed and No Argument was Made for *Pullman* Abstention.

At the district court and on appeal, petitioners argued vigorously that the challenged permanent display of 36 statues depicting the life of Christ violated neither federal nor state constitutional provisions. Only after the federal courts' resources had been expended in full litigation of this case, and only after petitioners' judgment had been reversed on state law grounds, did petitioners suddenly urge that the appeals

court should have abstained from reviewing the state law claims under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

This Court recently reiterated the well-established rule "that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have had jurisdiction." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984) (citations omitted). This Court has also long held that where a federal court properly has jurisdiction of a case, it "may resolve a case solely on the basis of a pendent state-law claim, see *Siler [v. Louisville & Nashville Railroad Company]*, 213 U.S. [174], 192-193 [1909]. . . and that in fact the Court usually should do so in order to avoid federal questions. . . ." *Pennhurst*, 465 U.S. at 117, citing *Siler, supra*, at 193, and *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Pennhurst, supra*, at 119 n.28. The rule announced in *Siler* was most recently cited by this Court with approval in *Finley v. United States*, 490 U.S. 545, 548 (1989). Thus, "where a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler, supra*, at 193.

In short, abstention from the exercise of federal court jurisdiction is "the exception rather than the rule." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 236 (1984). *See also Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1976). It has never been a "'doctrine of equity that a federal court should exercise its discretion to dismiss a suit merely because a state court could entertain it.'" *Id.* at 814, quoting *Alabama Public Service Comm'n v. Southern Railrod Co.,* 341 U.S. 361 (1951) (Frankfurter, J., concurring in result).

This case offers no reason for departing from these well-established rules for the simple reason that petitioners cannot meet the requirements for *Pullman* abstention.[4] Most fundamentally, this case does not involve an issue of unsettled state law. *Pullman,* 312 U.S. 496. Rather, the decision below rests on two provisions which have been a part of the California Constitution for well more than a century, and which consistently and repeatedly have been construed by the

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[4] Petitioners also contend that there is a conflict among the federal circuits on whether *Pullman* is required whenever a state constitutional claim is made, irrespective of how many times that provision has been interpreted previously by the state courts. *See* Petitioners' Brief at p. 22. That simply is not the rule of *any* circuit, nor of this Court, and none of the cases cited by petitioners support this inflexible rule.

California Supreme Court and the California courts of appeal, and in the opinions of several California attorneys general, to mandate a broader and more absolute separation of church and state than may be required under the federal Constitution. See Section IB at pp. 13-18, *infra*.[5] Thus, based on an expansive body of state appellate law, petitioners' argument

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[5]The California constitutional provisions at issue here have been interpreted by the California Supreme Court no less than five times, and by the appellate courts no less than nine times. In addition, both provisions have been the subject of numerous opinions issued by the state Attorneys General over the last century. *See, e.g., Ex Parte Newman,* 9 Cal. 502 (1852); *Evans v. Selma Union High School District,* 193 Cal. 43 (1924); *California Education Authorities v. Priest,* 12 Cal.3d 593 (1974); *Fox v. City of Los Angeles,* 22 Cal.3d 792 (1978); *California Teachers Assoc. v. Riles,* 29 Cal.3d 794 (1981); *Frohlinger v. Richardson,* 63 Cal.App. 209 (1923); *County of Los Angeles v. Hollinger,* 221 Cal.App.2d 154 (1963); *Johnson v. Huntington Beach Union High School District,* 68 Cal.App.3d 1 (1977); *Mandel v. Hodges,* 54 Cal.App.3d 596 (1976); *California School Employees Assoc. v. Sequoia Union High School District,* 67 Cal.App.3d 157 (1977); *Feminist Women's Health Center, Inc. v. Philibosian,* 157 Cal.App.3d 1076 (1984), *cert. denied,* 469 U.S. 1052 (1985); *Okrand v. City of Los Angeles,* 207 Cal.App.3d 566 (1989); *Perumal v. Saddleback Valley Unified School District,* 198 Cal.App.3d 64, *cert. denied,* 488 U.S. 933 (1988); *Woodland Hills Homeowners Organization v. Los Angeles Community College District,* 218 Cal.App.3d 79 (1990).

for abstention fails the heart of this Court's test for *Pullman* abstention as the issues of state law are well-settled.[6]

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[6] When reviewing a request for *Pullman* abstention, the Ninth Circuit also considers two other factors: whether the suit touches a sensitive area of social policy and whether a definitive ruling on the state law issue would end the controversy. *See J.R. Distributors, Inc. v. Eikenberry,* 725 F.2d 482, 487-88 (9th Cir. 1984). Judged by these standards as well, abstention is inappropriate.

The decision of the appeals court in this instance does not impinge on an area of sensitive local social policy traditionally recognized as requiring abstention. In particular, there is nothing about this dispute that is uniquely local in nature. Nor is there anything about this dispute that suggests that the state courts are better equipped to weigh the constitutional values at stake. *Compare, Manny v. Cabell,* 654 F.2d 1280 (9th Cir. 1980) (conditions in local detention facilities); *Fields v. Rockdale County Georgia,* 785 F.2d 1558 (11th Cir.) *cert. denied,* 479 U.S. 984 (1986) (local land-use disputes); *National Capital Naturists v. Board of Supervisors,* 878 F.2d 128 (4th Cir. 1989) (local public nudity displays); *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986) ("unique cultural and legal history" of United States territories and possessions).

Similarly, the state law question is not dispositive of the case. Because California's religion clauses have a meaning independent of their federal counterparts, a decision on state law would not "avoid, or substantially modify, the [federal] constitutional question presented." *Rindley v. Gallagher,* 929 F.2d 1552, 1555 (11th Cir. 1991). In any event, respondents would still be entitled to litigate their federal First

(continued...)

Despite the fact that petitioners satisfy none of the *Pullman* prerequisites, they now urge that the appeals court erred in deciding the state law questions. Petitioners make this argument on several grounds. First, they contend that the appeals court erred in not granting rehearing on *Pullman* abstention grounds once that court had issued its decision solely on state grounds because state law questions *now* predominate. Petitioner's Brief at p. 21. Petitioners' argument proves too much. Obviously, whenever a federal court decides a case, in which it properly has jurisdiction, on the state law questions only, state law claims could then be said to predominate. That does not mean, however, and petitioner makes no claim, that state law issues predominated this case generally or originally.

Petitioners also contend that, because there was no decision by the state supreme court *exactly* on all fours with the facts of this case, the Ninth Circuit could not decide the state law claims. Petitioners' Brief at pp. 20-21. Obviously, whenever a federal court decides a case that has not been decided on virtually the same facts by a state Supreme Court, this will be the argument a losing party will make. The critical

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[6](...continued)
Amendment claim if they were unsuccessful on their state law claims in state court.

issue is whether the governing state law principles are clearly established. As the Ninth Circuit recognized, the test was plainly satisfied here. *See* Point IB, *infra*.

B. The Court of Appeals Properly Applied Well-Settled California Case Law to Find That the Ownership and Promotion of a Christian Theme Park by the County Violated the More Stringent Separation Required by the California Constitution.

1. The Provisions of the California Constitution.

The California Constitution contains three sweeping, affirmative guarantees of religious liberty,[7] two of which are involved in this case. Taken together, these provisions deliberately express an even more complete separation of government and religion than is provided under the federal

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[7] Article I, sec. 4 mandates absolutely neutrality by government as it guarantees that religion may be practiced "without discrimination or preference," and prohibits any law "respecting an establishment of religion."

Article IX, sec. 8 prohibits "any sectarian or denominational doctrine . . . or instruction. . . directly or indirectly. . ." in the public schools.

Article XVI, sec. 5 prohibits government from dedicating public property to, or granting "anything to or in aid of any religious sect, church, creed, or sectarian purpose."

Constitution.[8] These three provisions have been a part of California's Constitution for well more than a century, have been applied with vigilance by the California state courts. As a matter of state law, the independent provisions of the California Constitution are not dependent on the federal Constitution for their interpretation. California Constitution, Article I, sec. 24; *People v. Brisendine,* 13 Cal.3d 528, 551, 531 P.2d 1099 (1975).

a. Article I, Section 4.

Interpreting Article I, sec. 4 of the state Constitution more than 140 years ago, the California Supreme Court emphasized that

> When our liberties were acquired, our republican form of government adopted, and our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense -- a complete separation between Church and State.

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[8] Except for the "establishment of religion" language in Article I, sec. 4, paralleling the language of the First Amendment, none of these provisions "mirror or derive from any part of the federal Constitution." *Fox v. City of Los Angeles,* 22 Cal.3d 792, 800, 587 P.2d 663 (1978) (Bird, C.J., concurring).

Ex Parte Newman, 9 Cal. 502, 506-507 (1858). Thus, under the California Constitution, "when there is no ground or necessity upon which a principle can rest but a religious one, then the [California] Constitution steps in and says that you *shall not enforce it by authority of law.*" *Id.* at p. 513 (Burnett, J., concurring)(emphasis in original).

As originally enacted, Article I, sec. 4 provided that "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state." California Constitution of 1849, Art. I, sec. 4. In 1879, this provision was amended to its present form, replacing the concept of "allowing" religious freedom with a "guarantee" of these fundamental rights.[9]

The Attorney General of California has written that "[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of

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[9] Article I, sec. 4 states in full:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State. The Legislature shall make no law respecting an establishment of religion. [¶] A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

religion" than that contained in the "no preference" clause. 25 Ops.Cal.Atty.Gen. 316, 319 (1955); Opinion, Pet.App. at A-12, citing *Fox v. City of Los Angeles,* 22 Cal.3d 792 (1978). California courts have interpreted this provision as being more protective of the principle of separation of church and state than the guarantee provided by the First Amendment. See *Fox, supra,* 22 Cal.3d at 800; *Okrand v. City of Los Angeles,* 207 Cal.App.3d 566 (1989). Under the "no preference" clause, "any appearance that the government has allied itself with one specific religion [is prohibited]." Opinion, Pet.App. at A-12 (citation omitted).[10]

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[10]The district court erroneously concluded that California courts apply this Court's *Lemon* test to analyze violations of Art. I, sec. 4 of the California Constitution. Pet.App. at B-20-21. In support of this position, the district court cited a California appellate court decision handed down nearly a decade before *Lemon*, and a 1978 California Supreme Court decision, *Fox,* which mentioned *Lemon* only in a concurrence. Opinion, Pet.App. at A-11, n.9.

Although California courts "may 'also consult principles of federal cases as they seem compelling guides to uncharted state grounds[,]'" *Feminist Women's Health Center, Inc. v. Philibosian,* 157 Cal.App.3d 1076, 1086 (1984), *cert. denied,* 470 U.S. 1052 (1985), California courts interpreting the *state* Constitution "should not view the *Lemon* test as absolute 'but as a touchstone with which to identify instances where the objectives of the establishment clause have been compromised.'" *Okrand, supra,* at 573 n.6.

b. Article XVI, Section 5.

Article XVI, sec. 5 of the California Constitution, also adopted in 1879, prohibits a union of church and state in language which has no federal origin. The clause provides, *inter alia,* that "Neither the Legislature, nor any . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose; nor shall any grant or donation of . . . real estate ever be made by the . . . county . . . for any religious . . . or sectarian purpose whatever[.]"

This clause has been characterized as "the definitive statement of the principle of government impartiality in the field of religion." 37 Ops.Cal.Atty.Gen. 105, 107 (1961). The debates of the 1879 constitutional convention indicate "that the provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes." *California Educational Facilities Authority v. Priest,* 12 Cal.3d 593, 604 (1974).

Mindful of the framers' goal, the California Supreme Court has interpreted this provision broadly: "The section [ ] forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official

involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." *Priest, supra,* at 605 n.12. Under California law, a two-part test is applied to analyze whether government aid violates Article XVI, sec. 5. First, courts look to see "whether the aid is direct or indirect, and second whether the nature of the aid is substantial or insubstantial." *Sands v. Morongo Unified School District,* 53 Cal.3d 863, 913 (1991).[11]

2. Application of California Law by the Ninth Circuit.

Contrary to petitioners' assertion that the Ninth Circuit's reliance on principles of First Amendment jurisprudence demonstrates that California law is unsettled, in fact the Ninth Circuit's opinion rests squarely on the decisions of the California courts and their consideration of federal case law only as it serves as guideposts to interpreting state constitutional provisions.

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[11]Petitioners contend that the Ninth Circuit's citation to the *Sands* decision is somehow evidence of unsettled state law. Pet.Br. at pp. 15-16. This argument is simply without merit. The only references to *Sands* are to that court's citation of two earlier decisions, both by Justice Mosk of the California Supreme Court, articulating the test to be applied under Article XVI, sec. 5 of the California Constitution. *See California Educational Authorities v. Priest, supra,* 605 n.12 and *California Teachers Assoc. v. Riles,* 29 Cal.3d 794, 809 (1981).

Referencing the district court's reliance on *Lynch v. Donnelly,* 465 U.S. 668, 692 (1984), and the "typical museum setting," which negates a message of endorsement (Decision, Pet.App. at B-16), the appeals court considered the "pivotal" distinction between a museum and the permanent, static display of Christ statues at issue in this case. Opinion, Pet.App. at A-16. The appeals court reasoned that this Court's museum/park analysis had been addressed by the California Supreme Court twice in similar analogies comparing library shelves and public galleries with static displays of religious symbols on public building facades. Applying California case law, the appeals court opined that a "'typical' museum, like the city hall rotunda gallery in *Okrand*, may display a variety of artwork." *Id.* at A-17. In this setting, the sense of governmental endorsement of, or "preference" for, a particular religious message could be offset by the changing and diverse messages of the displays. *Okrand,* 207 Cal.App.3d at 574; Opinion, Pet.App. at A-17.

By contrast, the park at issue here is restricted by deed to the Christian artwork permanently displayed there. Thus, the appeals court correctly analogized the New Testament tableaus of Jesus Christ's life in this case to the physical restrictions of the lighted cross displayed on the Los Angeles City Hall in *Fox,* 22 Cal.3d 792. In *Fox,* the California

Supreme court drew a distinction between the library shelves setting previously considered by that court in *Evans v. Selma Union High School District,* 193 Cal. 43 (1924), in which the state could "easily . . . offset a potential for preference[,]" and the "much less tractable [city hall tower]." *Id.* at 797.

The appeals court concluded that the district court's opinion misinterpreted California law when it essentially ignored these state court decisions and applied this Court's test in *Lemon v. Kurtzman* to decide the question which should have been decided under nonanalogous provisions of state law. First, the appeals court found that controlling California case law did not apply the three-part test of *Lemon* to analyze whether a challenged practice violates the "no preference" clause of Article I, sec. 4. Opinion, Pet.App. at A-11 n.9.

Second, the appeals court concluded that, under the "no preference" religion clause of the California Constitution, even the presence of a legitimate secular purpose will not save a government practice which exhibits a "preference" for one religion under Article I, sec. 4 of the California Constitution. *Id.* at A-18. Without disputing the factual findings by the district court, and relying on several decisions of the California appeal courts, the Ninth Circuit concluded that these facts simply did not "change the clear religious message of the

park" and the expression of a preference for the Christian faith. *Id.* at A-19.

Turning to the second provision of the California Constitution at issue here, Article XVI, sec. 5, the Ninth Circuit reviewed two decisions of California appellate courts, *Frohliger v. Richardson,* 63 Cal.App. 209 (1923) and *County of Los Angeles v. Hollinger,* 221 Cal.App.2d 154 (1963), as well as the decision of the California Supreme Court in *California Teachers Assn. v. Riles,* 29 Cal.3d 794 (1981). None of these decisions, interpreting an independent and unparalleled provision of state law, rests on federal case law. In fact, and as the Ninth Circuit noted, the decision in *Riles* holds that Article XVI, sec. 5 of the California Supreme Court often compels a result that may be directly "contrary to decisions by the United States Supreme Court in similar cases." Opinion, Pet.App. at A-24.

The Ninth Circuit correctly concluded that the park display challenged here, with its explicitly and exclusively Christian theme, violates Article XVI, sec. 5 of the California Constitution. The government has lent its "power and prestige" by placing its imprimatur directly on the religious message of the life of Christ, as portrayed by the statues, and has provided a place to present that message in a core government function, public park land.

Here, the aid to religion which results from the County's explicit and emphatic promotion of the park's religious theme of Christ's life and the County's maintenance of the park is direct, immediate and substantial. As the Ninth Circuit recognized, under Article XVI, sec. 5, it makes no difference under California law that a valid secular purpose may in fact underlie the challenged conduct if the benefit to religion is anything more than incidental to a primary public purpose. *Priest, supra,* at 605. In fact, the existence of a simultaneous secular purpose, such as the purported interest in tourism or preserving historical objects, is "wholly irrelevant and immaterial" in analyzing a claim under Article XVI, sec. 5. *County of Los Angeles v. Hollinger,* 221 Cal.App.2d at 160-61. *See also* Opinion, Pet.App. at A-19-20.

II. THE COURT OF APPEAL CORRECTLY REVIEWED *DE NOVO* THE DISTRICT COURT'S DECISION OF A MIXED QUESTION OF LAW AND FACT AND THE DISTRICT COURT'S DECISION OF STATE LAW

A. The Court of Appeal Properly Engaged in *De Novo* Review of the Decision of the District Court on State Law.

In *Salve Regina v. Russell,* 449 U.S. ___, 111 S. Ct. 1217 (1991), this Court held that a court of appeals should review *de novo* the determination by a district court of an issue of state law. *Id.* at 1221. The decision by this Court in *Salve*

Regina recognized that "appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* at 1222. Such a dual standard would defeat the Court's articulated goal of creating "doctrinal coherence" and eliminating "divergent development of state law among federal trial courts even within a single state." *Ibid.*

The opinion in *Salve Regina* expressly rejected the deferential standard of review of district court state law questions then followed by the majority of circuits and by the dissent in the Ninth Circuit. *In re Matter of McClinn,* 739 F.2d 1395 (9th Cir. 1984) (en banc). *Id.* at 1220-1221. This Court emphasized that the "'determination of state law . . . is a legal question, and . . . a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court.'" *Id.* at 1225 n.5 (quoting C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure,* § 4507, pp. 106-110 (1982).

In *Salve Regina,* this Court specifically considered the argument urged now by petitioners that application of a clearly erroneous standard to review of the district court's decision in this case might produce a contrary result to that

reached by the appeals court. Citing with approval the decision by the majority of the Ninth Circuit in *McClinn, supra,* this Court reaffirmed that "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.' *Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, at 501 [ ] [(1984)]. *When de novo review is compelled, no form of appellate deference is acceptable.*" *Salve Regina, supra,* at 1224 (emphasis supplied).

De novo review is clearly compelled in this instance. The opinion of the appeals court makes plain that its decision rests on a question of state law as it found "that the trial court misread the California Constitution and the state court opinions interpreting it[.]" Opinion, Pet.App. at A-9.

B. The Court of Appeals Properly Reviewed *De Novo* a Mixed Question of Fact and Law.

The "application of a rule of law to the established facts is reviewed *de novo* where the question requires consideration of legal concepts in the mix of fact and law." *United States v. McConney,* 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). While appellate courts ordinarily are required to engage in the deferential review urged by petitioners and to give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses" on factual questions (FRCP 52(a)), if "the question requires [the court]

to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed *de novo.*" *McConney, supra,* at 1202, citing *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n.19 (1982).

Despite this well-settled rule, petitioners now urge that the Court of Appeal erred in not applying a "clearly erroneous" standard to the factual findings of the district court. However, this deferential standard of review is appropriate only when the application of a rule of law to the facts of the case requires the court to engage in an analysis that is "essentially factual." *Pullman-Standard,* 456 U.S. at 288. This Court has defined an "essentially factual" inquiry as one based "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct." *Commissioner v. Duberstein,* 363 U.S. 278, 289 (1960). No such analysis exists in the trial court's opinion in this case.

To the contrary, the injury alleged in this case "goes well beyond the facts of the case and requires consideration of the abstract legal principles that inform constitutional jurisprudence." *McConney, supra,* at 1203. Nonetheless, petitioners suggest that the appeals court engaged in *de novo*

review of the facts, separate from the law, when the court opined that "However, every religious display that is put in 'artistic' form, such as painting or sculpture, instead of the 'mannequin-like' form of the creche or cross is not saved from First Amendment scrutiny." Opinion, Pet.App. A-16; Petitioners' Brief at p. 24. Clearly, this statement represents the application of law to facts and is, therefore, a mixed question of law and fact properly reviewed by an appellate court *de novo.*

De novo review is particularly appropriate in this case where the evidence does not depend upon consideration of the "accuracy of witnesses' recollections" and their credibility. *McClinn,* 739 F.2d at 1398. Rather, the inanimate physical evidence concerning the government's written description and promotion of a Christian theme park, as well as photographic evidence of the statues and park grounds, was equally available to the district court and the court of appeal. Thus, there is no special "intuition" in this case which would require deference to the district court under FRCP 52(a).

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

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